

October 17, 2013, Planning Commission Agenda Comments

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Item No. 1 Minutes of October 3, 2013

These are good minutes, and I could detect no typos, but I have one comment.

Page 1: The draft minutes say “*The meeting was called to order at 6:30 p.m.*” My recollection is the meeting may, due to unusual circumstances, have inadvertently started a minute or two before 6:30. I mention this because out of the respect to members of the public who may be rushing to get to the Council Chambers at the appointed hour, it can be extremely frustrating to enter the room at that hour and find the meeting already in progress.

Item No. 2 Wireless Telecommunications Facilities Ordinance Update

I find this item somewhat difficult to comment on because at the September 19 study session, Vice Chair Tucker, and others, made a number of suggestions, and in the absence of a revised draft ordinance, I am uncertain (aside from the questions listed in the present staff report) which of those changes staff may be considering incorporating, and which not.

Although I think the proposed ordinance is generally an improvement over the present one, I continue to have several concerns (repeated with slightly more detail below):

Concern 1 (Addressing Private Impacts): It appears that the existing ability to deny an application based on a proposed facility’s impacts on nearby private properties is being written out of the existing code. Since I have not heard such a change is compelled by state or federal law, I have to question whether doing this is in the best interest of Newport Beach property owners. I suppose that those who favor unregulated deployment of wireless transmitters could argue that such criteria make approvals more difficult, and therefore should be avoided, but I think it is a change whose wisdom should be carefully weighed.

Concern 2 (Universal Noticing): Although by incorporating the wireless provisions into the Zoning Code the noticing to the public of pending approvals is greatly improved over the current system, I am troubled by the proposed use of the Zoning Clearance (ZC) mechanism for certain classes of applications. The problem with the ZC procedure is that although the staff decision can be appealed to the Commission, since no notice is provided, only the wireless applicant is aware a decision has been made. This potentially deprives the public of its opportunity to question not only the substance of the application, but also whether staff’s decision to process it under the ZC provisions was appropriate. For those who believe citizens should retain control of the mechanisms of government, this is troubling.

Concern 3 (Learning from Others): Since staff is inundated with suggestions from the industry, I think the ordinance drafting process might profit from a more careful and systematic study of how similar issues have been dealt with in California cities with citizen friendly telecom ordinances. One assumes this has been done internally by staff, but the extent of that is unknown, and I think that in considering the possible language to be used in the draft ordinance, the Commission might want to see the comparable text from other city’s ordinances.

Addressing Private Impacts

In my view, telecom applications are fundamentally different from most zoning decisions because the applicant is not proposing to build on a limited and restricted piece of land they already own and wish to develop, but rather is seeking approval of a suitable site for development from a wide range of possible locations. Hence the rights being impinged on by a denial are quite different.

Since it came up at the September 19 Planning Commission study session, the specific protections enjoyed by private land owners under the current system that I see being written out of the proposed code range from the subtle:

The existing [Subsection 15.70.010](#) (Purpose and Intent) “A. *Purpose. The purpose of this chapter is to provide for wireless telecommunication (“telecom”) facilities on public and private property consistent with federal law while ensuring public safety, reducing the visual effects of telecom equipment on public streetscapes, **protecting scenic, ocean and coastal views**, and otherwise mitigating the impacts of such facilities.*” and “3. *Encourage telecom facilities to be located in areas where **adverse impacts on the community** and on public views are minimized.*”

which can be read as protecting views (of the types cited) and avoiding impacts, whether to public or private properties; has been changed by inserting the word “public” in a new place to imply there is no private protection:

Proposed [Subsection 20.49.010](#) (Purpose) “A. *The purpose of this Chapter is to provide for wireless telecommunication facilities (“Telecom Facilities”) on public and private property consistent with state and federal law while ensuring public safety, reducing the visual effects of telecom equipment on public streetscapes, **protecting scenic, ocean and coastal public views**, and otherwise mitigating the impacts of such facilities.*”

to the more obvious deletions of the following **existing** provisions:

[15.70.070 Permit Review Procedures.](#)

B. Submission Requirements. “4. *Visual Simulations. Visual simulations showing “before” and “after” views of the proposed facility, unless the reviewing department director determines that such simulations are not necessary for the application in question. **Consideration shall be given to views from both public areas and private residences.***”

C. Review Process 3. Director’s Action. “c. *If the Director determines that conformity to standards are in doubt, he or she shall refer the application to the City Council for special review under the procedures set out in subsection (F) of this section.*”

F. Special Review by Council

1. Applicability “c. *Any telecom application which the department director determines requires special review in order to serve the public interest.*”

3. Council Action. *“The City Council shall take action on the telecom permit within sixty (60) days after the determination that the application is complete. Applications subject to special review **may be approved** by the City Council if it makes the following findings:*

b. The approved facility will not result in conditions which are materially detrimental to nearby property owners, residents, and businesses, nor to public health or safety.”

As best I can tell the above is all proposed to be reduced to single required finding (in proposed Subsection 20.49.070.I.1 that “a. *The proposed Telecom Facility is visually compatible with the surrounding neighborhood.*” Together with the revised purpose of the code, this could be read as only requiring “visual compatibility” from public spaces.

It might be noted there are existing provisions in Newport Beach Municipal Code [Title 13](#) (Streets, Sidewalks and Public Property), that apparently are not being proposed to be deleted at present, but which also appear to be intended to protect private property owners from the impacts of above ground facilities constructed in the public rights of way. In particular, in [Subsection 13.20.070.B](#), the criteria the Public Works Director is supposed to consider in issuing a PROW Permit include “3. *The damage or disruption, if any, to the PROW or any public or private facilities, improvements, aesthetics, services, pedestrian or vehicle travel or landscaping if the permit is granted.*” and “5. *The adverse aesthetic or blighting effect of any above ground facilities by virtue of their design, color, dimensions, locations and quantity.*” The City also protects private property from growth of City-owned trees in [City Council Policy G-3](#) (Preservation of Views).

Universal Noticing

Although somewhat different from the procedure in the present Zoning Code, I personally think the noticing should begin as early as possible in the application process, and not be deferred to the approval stage. I think the Coastal Commission model is a good and very practical one, in which the applicant is required to place a yellow public notice of the pending permit on the proposed development site at the same time the application is submitted. I believe examples of other cities with earlier and more rigorous public participation can be found, and that the results probably benefit from that participation.

Learning from Others

As a small sample of what can be learned from the response to wireless concerns in other communities, I found interesting the following findings underlying [a wireless ordinance](#) adopted in Burbank two years ago, which I think articulate the fear of many that inadequately regulated wireless deployment (allowing unscreened towers, etc.) can give an “industrial” feel to a community:

THE COUNCIL OF THE CITY OF BURBANK FINDS:

A. The industrial appearance of Wireless Telecommunications Facilities ("WTFs") is inconsistent with the general landscape and character of the community. The visual blight created by poorly sited WTFs disrupts the residential character of the neighborhood and detracts from the natural beauty and historical integrity that is valued by the City and its residents.

B. Residents have moved to the City for its aesthetics and rely on the City to preserve its unique characteristics. Residents do not want to live in neighborhoods where WTFs have been indiscriminately erected. Residents expect the development of their community to occur in a consistent and predictable manner.

C. The harm of WTFs to the aesthetics of the City negatively impacts the views of residents and may devalue property as communities blemished by unregulated WTFs may be perceived as undesirable.

D. Poorly sited WTFs may also become a distraction to motorists by obstructing driver's sightlines and thereby create a hazard to motorists.

E. Thoughtful regulation of the aesthetic aspects of WTFs can alleviate the adverse effects that such facilities have on the community.

Hopefully our new ordinance will adequately address concerns of this sort.